ed by the complainant, he is at liberty to institute civil proceedings to recover the sum in respect of which the appellant dishonestly misappropriated."

I must also not forget the impact this type of crime has on the public and public confidence.

I have taken all factors into account including his mitigation plea which was urged so ably on his behalf by counsel. I have also carefully and anxiously considered all the other matters that could be put in his favour and after taking into account his guilty plea (but there really was not much more he could do but to plead guilty once the defalcations had been discovered) and the fact that he is a first offender (but then in almost every case of breach of trust the accused is a first offender), I have now to pass an appropriate sentence. Despite the great punishment that offenders of this sort bring upon themselves, this Court must, nevertheless, pass a sufficiently substantial term of imprisonment to mark publicly the gravity of this mean offence.

In my judgment, the appropriate sentence for this mean offence is imprisonment for 12 years and a fine of $50,000 in default of which there will be imprisonment for a further six months. The imprisonment is to take effect from December 12, 1986. The sentence is meant to be punitive. It is meant to reflect this Court's abhorrence of this type of mean criminal conduct. It is a sentence passed in the interest of the public. It is also meant to deter others who are minded to embark on so mean a crime.

Convicted and sentenced accordingly.

Solicitors: *Shearn Delamore & Co.*

The judge went on to say (pp. 37, 38): "The magistrate also observed that the appellant knew the consequences of his misappropriating someone else's money. That is true. The appellant himself had admitted his foolishness, nonetheless *the court should also consider other penalties he has to suffer consequent upon his conviction.* The stigma of the conviction for an offence such as this and of being struck off the roll will have to be borne by him for the rest of his life." (emphasis supplied)

Compare this with the way in which Lawton L.J. dealt with a similar situation: see *Davies* (*supra*), at pp. 208, 209:

"As a result of what the Law Society's accountants found the appellant was summoned before the Disciplinary Committee of the Law Society and, as was inevitable, he was struck off the Roll of Solicitors. That was in June 1975. He was a ruined man. He was then aged 54. He could not practise his profession and, until such time as the Law Society gave him leave to do so – and it was unlikely that they would for a very long time – he could not even work as a solicitors' clerk. He had, however, brought these troubles upon himself. They were troubles arising from what he had done."

HONG LEONG FINANCE BHD. v. HON HOI WENG & ORS.

[O.C.J. (V.C. George J.) January 16, 1987]

[Kuala Lumpur – Civil Suit No. C 294 of 1983]

Practice and Procedure – Stay pending appeal – Whether application allowed – Distinction drawn between matter decided after full trial and one summarily decided.

The cause of action the plaintiffs had against the fourth defendant appears to be that the fourth defendant had agreed to indemnify the plaintiffs in respect of loss they may suffer as a result of the plaintiffs entering into a hire-purchase agreement in respect of a certain machine with the first and second defendants. The third defendants had guaranteed payment of amounts due from the first and second defendants to the plaintiffs.

The first and second defendants delivered a statement of defence. The plaintiffs sought to have it struck off as disclosing no reasonable defence and/or being frivolous and vexatious. Abdul Razak J. heard the application and dismissed it. He held that there were triable issues.

In the meantime the plaintiffs obtained judgment in default against the third and the fourth defendants. That against the fourth was by consent set aside after which the plaintiffs took out 0.14 proceedings against the fourth defendant. The Senior Assistant Registrar who heard it gave summary judgment against the fourth defendant who has appealed. Pending the appeal, the fourth defendant applied for a stay of execution.

Held, allowing the application: (1) in respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial and enquiry and one summarily arrived at by a Senior Assistant Registrar. In the former case the general rule no doubt continues to be that special circumstances have to be shown (there could no doubt be exceptions to the general rule). But in the latter it seems to me that a demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient for the court to exercise its discretion to order a stay pending appeal;

(2) in the instant case in the face of the view taken by Abdul Razak J. on the claim against the first and the second defendants and in the circumstances of the case, the fourth defendant has shown that there is every probability that the appeal may succeed.

Per curiam: "In my view reliance on *Syarikat Berpakat*[1] and on *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[2] (and on the cases cited in those judgments referred to therein) in respect of an application for stay pending appeal from the exercise of summary jurisdiction given by 0.14 by a Senior Assistant Registrar is misconceived."

Cases referred to:

(1) *Syarikat Berpakat* v. *Lim Kai Kok* [1983] 1 M.L.J. 406.
(2) *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 M.L.J. 131.
(3) *Griffiths* v. *Benn* 27 T.L.R. 346, 350.
(4) *Atkins* v. *Great Western Rly. Co.* 2 T.L.R. 400.
(5) *Smith, Hogg & Co. Ltd.* v. *The Black Sea & Baltic General Insurance Co. Ltd.* 162 L.T. 11.
(6) *Monk* v. *Bartram* [1891] 1 Q.B. 346.

CIVIL SUIT.

Mathias Chang for the applicants/defendants.
Ong See Seng for the respondent/plaintiff.

Cur. Adv. Vult.

V.C. George J.: The cause of action the plaintiffs have as against the 4th defendant appears to be that the 4th defendant had agreed to indemnify the plaintiffs in respect of loss they may suffer as a result of the plaintiffs entering into a hire-purchase agreement in respect of a certain machine with the 1st and 2nd defendants. The 3rd defendants had guaranteed payment of amounts due from the 1st and 2nd defendants to the plaintiffs.

The 1st and 2nd defendants delivered a statement of defence. The plaintiffs sought to have it struck off as disclosing no reasonable defence and/or of being frivolous and vexatious. Abdul Razak J. heard the application and dismissed it. In a written judgment he held that there were triable issues that were far from being frivolous and vexatious.

In the meantime the plaintiffs had obtained judgment in default against the 3rd and 4th defendants. That against the 4th defendant was by consent set aside after which the plaintiffs took out 0.14 proceedings against the 4th defendant. The Senior Assistant Registrar who heard it gave summary judgment against the 4th defendant who has appealed. The appeal has not been heard.

Pending appeal the 4th defendant by enclosure (73) applied for and obtained a stay of execution. My reasons for granting the stay are as follows:–

The substantial ground relied on is the contention that there is every probability that the 4th defendant will succeed in the appeal. The argument shortly stated was that if the 4th defendant has any liability, it is only to indemnify the plaintiffs in respect of loss incurred vis-a-vis the hire-purchase agreement entered into by the 1st and 2nd defendants. In the face of the fact that Abdul Razak J. has held that the claim as against the 1st and 2nd defendants for loss has to be disposed off after full trial and not summarily, it follows as a matter of course that the 4th defendant should be also entitled to have the issues tried and that accordingly in all probability the judge hearing the appeal from the Senior Assistant Registrar's Order 14 judgment will allow the appeal and give leave to defend. And that accordingly the justice of the case calls for the Court granting a stay. The argument certainly has the approbation of logic.

For the plaintiffs, counsel relied on *Syarikat Berpakat* v. *Lim Kai Kok*[1] and *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[2] to submit that unless special circumstances were shown to support the application for stay it must be refused and that merits in the appeal is not a special ground.

In *Syarikat Berpakat* it would appear that there was a judgment of the Sessions Court after a full trial. The reliance placed by Hashim Yeop A. Sani J. (as he then was) on the rule must be looked at in that context that there had been a full trial.

In *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* in considering an application for stay pending appeal from the Federal Court to the Yang di-Pertuan Agong *Griffiths* v. *Benn*[3] was referred to.

"In *Griffiths* v. *Benn* the Master of the Rolls indicated that:–

'... where, after a full hearing, a definite conclusion was arrived at by the Court of Appeal, it was not fair on a successful litigant to hamper him with any such undertaking and it would need most exceptional circumstances to induce this court to accede to such an application.' "

Atkins v. *Great Western Rly. Co.*[4] was also cited. There there had been trial and presumably after the trial judge had refused stay pending appeal, application was made to the Court of Appeal. The Court of Appeal asked for special circumstances. *Smith, Hogg & Co. Ltd.*[5] was another case cited. There it was a stay pending appeal to the House Lords. After considering these cases the learned Chief Justice in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* stated the rule (at page 132) thus:

"It is my view that where stay of execution has previously been refused by this court after a hearing of an appeal last-

ing over a week, an application made to the same court for stay pending an appeal must be supported by special circumstances."

In *Syarikat Berpakat* which had been referred to earlier, Hashim Yeop A. Sani J. in referring to the judgment in *Monk* v. *Bartram*[6] said:

"In that case stay had been refused by the trial judge and in the Court of Appeal it was held that where a stay of execution has been refused by the trial court an application made in a Court of Appeal for a stay pending appeal must be supported by special circumstances and allegations that there has been misdirection or that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment are not special circumstances. Lord Esher, M.R. in the Court of Appeal when refusing the application for stay said:

> 'We have made enquiries, and find that the practice in the Divisional Court has been similar to that as to appeals in this court in cases of trials before a judge without a jury. It has been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shown to exist.' "

In each of those cases there was either a full trial or a full hearing of an appeal by a superior court.

In my view reliance on *Syarikat Berpakat* and on *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* (and on the cases cited in those judgments referred to therein) in respect of an application for stay pending appeal from the exercise of summary jurisdiction given by O.14 by a Senior Assistant Registrar is misconceived.

An analysis of the judgments in those two cases and of the judgments cited therein shows that it would be more correct to state the rule as follows: Where judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) the general rule is that stay of execution pending appeal (or where it applies, further appeal) will not be granted unless there are special circumstances.

It has become the practice in the High Court, certainly in Kuala Lumpur, that the Senior Assistant Registrars (many of whom are comparatively speaking junior officers) are burdened with long lists and that out of necessity they dispose of their summary jurisdiction in so summary a manner that most of the judges who hear appeals from those decisions do not now require the Senior Assistant Registrar to even write grounds of decision but hear the appeal by way of a re-hearing of the original application, a re-hearing in every sense of that word. This is not to derogate the judicial role played by the Senior Assistant Registrars. They act as an effective filter stopping some of the more blatantly unmeritorious applications from going through the sieve.

In respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial and enquiry and one summarily arrived at by a Senior Assistant Registrar. In the former case the general rule no doubt continues to be that special circumstances have to be shown (there could no doubt be exceptions to the general rule). But in the latter it seems to me that a demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient for the Court to exercise its discretion to order a stay pending appeal.

In the instant case in the face of the view taken by Abdul Razak J. on the claim against the 1st and 2nd defendants and in the circumstances of the case it is my opinion that the 4th defendant has shown there is every probability that the appeal may succeed. Stay pending appeal from the Senior Assistant Registrar's decision was allowed.

Order accordingly.

Solicitors: *Suhaimi, Khor, Zulkifly & Chang; Mah-Kok & Din.*

BUKIT YEW SDN. BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Harun J.) February 6, 1987]

[Kuala Lumpur – Tax Appeal No. A3/83]

Revenue Law – Income Tax – Sale of land – Whether profits accrued subject to real property gains tax or whether income assessable for income tax – Real Property Gains Tax Act, 1976.

The appellant company was incorporated in November 29, 1963. On February 26, 1964, the appellant acquired a piece of land. The said land was sold on November 17, 1978. The appellant was assessed to real property gains tax on the gain which assessment was paid to the respondent. The respondent subsequently on July 5, 1980, raised